



New Jersey Libertarian Party

Preempted Ordinance Repeal Project

John Paff, Chairman

P.O. Box 5424

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Email: lpismc@pobox.com

June 10, 2010

Hon. Brian G. Gallagher, Mayor, Members of the Borough Council
Borough of Somerville
25 West End Ave
Somerville, NJ 08876 (via e-mail KSluka@somervillenj.org)

Dear Mayor Gallagher and Council members:

I write, both individually and in my capacity as Chairman of the New Jersey Libertarian Party's Preempted Ordinance Repeal Project, seeking review and repeal of the majority of Chapter 122 (Peace and Good Order) from the Borough Code.

Attached is an April 9, 2010 letter from the Somerset County Prosecutor's Office that responded to my December 22, 2009 complaint (also attached) that the Somerville Borough Prosecutor violated a 1998 Attorney General Directive by allowing municipal court defendants to downgrade statutory disorderly persons and petty disorderly persons offenses to § 122-9 (Disorderly Conduct) violations. As you can see, the Prosecutor's Office found that "as [I] correctly noted, Municipal Prosecutors shall not downgrade . . . [Title] 2C charges to municipal ordinance violations where there has been a preemption by State statute."

Given that § 122-9 is invalid, I ask that you please direct your Borough Attorney to draft an ordinance repealing it. Also, many of the other provisions within Chapter 122 are also preempted and invalid and I ask that you repeal those provisions as well.

Thank you for your attention to this matter. I look forward to hearing from you.

Sincerely,

John Paff



SOMERSET COUNTY PROSECUTOR'S OFFICE
40 NORTH BRIDGE STREET
P. O. BOX 3000
SOMERVILLE, NEW JERSEY 08876-1262

WAYNE J. FORREST
PROSECUTOR

TELEPHONE: 908-231-7100
FAX: 908-704-0750
WWW.SCPO.NET

April 9, 2010

Chairman John Paff
Pre-empted Ordinance Repeal Project
New Jersey Libertarian Party
P.O. Box 5424
Somerset, New Jersey

Dear Mr. Paff:

Thank you for your correspondence regarding improperly downgraded charges in both the Somerville and South Bound Brook Municipal Courts.

As you correctly noted, Municipal Prosecutors shall not downgrade disorderly persons and petty disorderly persons 2C charges to municipal ordinance violations where there has been a preemption by State statute. (New Jersey Attorney General Directive, November 18, 1998, Plea Agreements in Municipal Courts).

Accordingly, thanks to your due diligence, we will be sending out a letter with the directive to each of our Municipal Prosecutors to remind them of proper plea bargain procedure.

Sincerely,

WAYNE J. FORREST
PROSECUTOR

By:



Michael McLaughlin
Assistant Prosecutor



New Jersey Libertarian Party

Preempted Ordinance Repeal Project

John Paff, Chairman

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December 22, 2009

Thomas Chirichella, Assistant Prosecutor
Somerset County Prosecutor's Office
P.O. Box 3000
Somerville, NJ 08876

Dear Mr. Chirichella:

I write, both individually and in my capacity as Chairman of the New Jersey Libertarian Party's Preempted Ordinance Repeal Project, to complain that the Prosecutor of the Somerville Municipal Court—much like the South Bound Brook¹ Prosecutor—is improperly downgrading statutory charges.

I visited Somerville's municipal court and looked through a few court calendars from late 2009. Eight cases that had been recently downgraded to municipal ordinance violations are listed in the following table.

Complaint No.	N.J.S.A. charged	Defendant
S-2009-000253	N.J.S.A. 2C:29-3B(4)	Pressley, Charise
SC-2009-005099	N.J.S.A. 2C:29-1	Ford, Daniel
S-2009-000228	N.J.S.A. 2C:20-6	Rehill, John
S-2009-000215	N.J.S.A. 2C:17-3B(2)	Miller, Kendall
S-2008-000247	N.J.S.A. 2C:17-3A(1)	Guzman, Antonio
S-2009-000227	N.J.S.A. 2C:12-1A	Highland, John
W-2009-000204	N.J.S.A. 2C:12-1A	Cuffie, Glenn

Each of these eight offenses was downgraded to Somerville Code § 122-9, which was enacted in 1966. That section reads:

§ 122-9. Disorderly conduct.

It shall be unlawful for any person or persons to assemble in the streets, public places or public halls of the Borough of Somerville, or be upon the streets, sidewalks, steps or platforms of any store,

¹ See my December 7, 2009 letter to you regarding South Bound Brook a copy of which, without some of the exhibits, is on-line at <http://pcnj.org/OGTF/SBBProsecutorComplaint.pdf>

business house, park, church or railroad station, bus or other conveyance or within or around any building, dwelling house, office, place of business, factory or private or public place within said borough, behaving in a disorderly manner by noisy, rude or indecent behavior, by using profane, vulgar or indecent language, by making insulting remarks or comments to others, by begging for alms, by fighting, by unnecessary congregating in groups upon any street, sidewalk, railroad station or other public place to the obstruction thereof or to the annoyance of other persons lawfully there being, or by unnecessarily doing or performing any other disorderly thing whatsoever that shall disturb the peace or quiet of any family, neighborhood or any of the inhabitants of the borough.

I believe that the ordinance's invalidity has been made clear by State v. Paserchia², 356 N.J. Super. 461 (App.Div.2003). Accordingly, statutory violations may not be downgraded to it regardless of whether there is a "nexus between the original charge and" § 122-9 and regardless of whether "a factual basis for a plea [was] placed on the record." See, Directive, page 2.

I presented this argument to Mayor Brian G. Gallagher and the Somerville Borough Council during the public portion of their December 21, 2009 meeting and specifically asked them to direct the Borough Attorney to review Chapter 122—the Borough's Peace and Good Order Code³—in its entirety and recommend repeal of its invalid provisions. Mayor Gallagher so directed the Borough Attorney and assured me that he would share the attorney's findings with me.

Such a review may take months to complete. Given that the Somerville Municipal Prosecutor appears to be presently violating Attorney General Verniero's Directive, I ask that you please direct him to cease his practice of allowing guilty pleas to Code § 122-9 or other superseded provisions of the Borough's Code.

Thank you for your attention to this matter. I look forward to hearing from you.

Sincerely,



John Paff

cc. Mayor and Council, via e-mail to Municipal Clerk
Municipal Court Prosecutor, via e-mail to Municipal Court Administrator

² The ordinance that was invalidated by Paserchia stated: "No person shall disturb, by any violent, abusive, loud or threatening language, or disorderly or indecent behavior of any kind, any lawful congregation or assembly of any kind or description in any place or building within the Township."

³ The Peace and Good Order code is on-line at <http://lpcnj.org/OGTF/SomervillePandGCode.pdf>



State of New Jersey

DEPARTMENT OF LAW AND PUBLIC SAFETY
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CHRISTINE TODD WHITMAN
Governor

PETER VERNIERO
Attorney General

November 18, 1998

TO ALL MUNICIPAL COURT PROSECUTORS

Re: Plea Agreements in Municipal Courts

Dear Municipal Prosecutor:

I have been advised that there is an increasingly widespread practice developing in municipal court where municipal prosecutors are downgrading criminal or traffic offenses from State statutes to municipal ordinance violations where State law has pre-empted the field. For reasons expressed below, this practice should be discontinued immediately.

According to information my office has received regarding this downgrade plea agreement procedure, defendants, in some cases, are assessed fines greater than permitted by State statute. An incentive for some defendants to accept this plea agreement with its increased fines is the fact that the defendants are informed that if they accept the plea offer they will avoid the imposition of other statutory penalties or administrative actions, such as motor vehicle points, *N.J.A.C. 13:19-10 et seq.*, and administrative license supervision, *N.J.A.C. 13:19-11 et seq.*

In most cases, State law has pre-empted the field, thus precluding the municipality from enacting an ordinance that provides for a sanction proscribing certain conduct. Our courts have defined the circumstances when State law pre-empts the authority of a municipality to enact such a municipal ordinance. The essential factors are:

1. Does the ordinance conflict with the state law, either because of conflicting policies, or operation effect, that is, does the ordinance forbid what the Legislature has permitted?
2. Was the state law intended expressly or impliedly to be exclusive in the field?

3. Does the subject matter reflect a need for uniformity?
4. Is the State scheme so pervasive or comprehensive that it precludes coexistence of municipal regulation?
5. Does the ordinance stand as an obstacle to the accomplishment and execution of the full purposes and objectives of the Legislature?

Overlook Terrace Management Corp. v. West New York Rent Control Bd., 71 N.J. 451, 460-462 (1976). See also *State v. Crawley*, 90 N.J. 241, 248, 250 (1982); *Summer v. Teaneck Twp.*, 53 N.J. 548, 554-55 (1969); *State v. Ulesky*, 54 N.J. 26, 29 (1969); *Kennedy v. Newark*, 29 N.J. 178 (1959).

If a municipal prosecutor has concerns whether State law has pre-empted a particular area of the law, the municipal prosecutor should discuss the matter with the County Prosecutor's Office or with the Prosecutors and Police Bureau within the Division of Criminal Justice. The municipal prosecutor, as an officer of the court, cannot simply ignore this obligation. The failure of the municipal prosecutor to take appropriate action in these matters may result in disciplinary action and possible sanction by the State Supreme Court. See *In the Matter of Norton and Kress*, 128 N.J. 520 (1992); *In the Matter of Segal*, 140 N.J. 468 (1992).

In addition, there must be a nexus between the original charge and the new charge. The factual basis for the plea must establish that the elements of the offense have been committed by the defendant. Pursuant to R. 7:6-2, a factual basis for a plea must be placed on the record. It is the responsibility of the prosecutor to establish this factual basis on the record. In addition, the prosecutor must state on the record the reasons for the downgraded plea agreement. *State v. Taylor*, 80 N.J. 353, 361-62, 403 A.2d 889 (1979); *State v. Sainz*, 107 N.J. 283, 293 (1987).

The responsibility of offering a plea agreement rests exclusively with the prosecutor. This is not a function of a court. In no case should a blanket plea offer be distributed or mailed to all defendants by either the court or the municipal prosecutor. It is important for the prosecutor to keep in mind that a "prosecutor is not an ordinary advocate. Rather, the prosecutor has an obligation to defendants, the State and the public to see that justice is done" [Comment, *Guidelines for Operation of Plea Agreements in the Municipal Courts of New Jersey*, Appendix to Part VII court Rules. Guideline].

Pursuant to the provisions of the Criminal Justice Act of 1970, *N.J.S.A.* 52:17B-112, and the provisions of *N.J.S.A.* 2B:12-27, I direct that each of you adhere to the provisions of this letter. Thank you for your continued cooperation.

Sincerely yours,



Peter Verniero
Attorney General

cc: Paul H. Zoubek, Director
Debra L. Stone, Deputy Director
Hon. James Ciancia, Director, Administrative Office of the Courts
Dennis L. Bliss, Assistant Director
Municipal Court Services, Administrative Office of the Courts
All County Prosecutors
DAG Greta Gooden-Brown, Chief
Prosecutors and Police Bureau
William John Kearns, Jr., General Counsel
N.J. State League of Municipalities